GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2016-14

December 16, 2015

VIA ELECTRONIC MAIL

Mr. Don Padou

RE: FOIA Appeal 2016-14

Dear Mr. Padou:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"). In your appeal, you assert that the Office of the Deputy Mayor for Planning and Economic Development ("DMPED") improperly withheld records you requested under the DC FOIA.

Background

On July 28, 2014, Friends of McMillan Park submitted a FOIA request to DMPED for all of the emails involving a particular DMPED employee and a list of keywords related to the development of McMillan Park. On September 9, 2014, DMPED agreed to produce approximately 3,400 pages of responsive emails but stated that several emails were being withheld for containing "'commercial or financial information obtained from outside the government' that will 'result in substantial harm to the competitive position of the person from whom the information was obtained' or attorney-client communications and internal deliberations. … pursuant to D.C. Official Code §§2-534 (a)(1) and (4) respectively." On October 21, 2015, DMPED produced a *Vaughn* Index listing the responsive records that were withheld in their entirety.[1]

On appeal, you assert that DMPED did not provide sufficient justification to withhold information under the exemptions it claimed.[2] You also assert that records withheld for deliberative process and attorney-client privilege were shared with the consortium of developers hired to develop McMillan Park; therefore, the exemptions are not applicable because the communications were shared outside the protective scope of the exemption.

As the *Vaughn* Index listed an extensive number of records, it is not possible for us to review and analyze all of the email messages and issue a decision in a timely manner. Therefore, we

[1] The appeal and the email transmitting the *Vaughn* Index refer to documents being redacted and withheld; however, it is our understanding that no documents were redacted, and all of the documents listed in the *Vaughn* Index were withheld in their entirety.
[2] The appeal cites the attorney-client privilege under D.C. Official Code § 2-534(e); however, the attorney-client privilege is incorporated under D.C. Official Code §§ 2-534(a)(4).

requested that DMPED provide our office with a sample of the documents for *in camera* review. To ensure a random and representative sample, we requested unredacted copies of the top entry from each page of the 33-page *Vaughn* Index. DMPED provided this Office with the 33 requested records on December 3, 2015. Each of the 33 records provided contained an e-mail chain, amounting to 140 pages of emails. Several emails included attachments, which increased the volume of the representative sample. The email chains typically involve multiple parties. As a result, some parts of the chain may involve only governmental parties while other portions include additional non-governmental parties.

On December 15, 2015, DMPED provided this Office with a response to your appeal, in which it reaffirmed and explained its use of exemptions for trade secrets, deliberative process, and attorney-client privilege.[3] Regarding the exemption for trade secrets, commercial, and financial information, DMPED asserts that there is actual competition in the real estate development market in the District and the release of the withheld information would result in competitive harm to the consortium of developers involved with McMillan Park. Regarding the deliberative process privilege, DMPED asserts that the consortium of developers entered into a Development Management Services Agreement ("DMA") with the District. Pursuant to the DMA, there is a separation between the developers' role acting on behalf of the District and its private interests. DMPED asserts, as a result, that emails with members of consortium of developers or its subcontractors and consultants acting on behalf of the District qualify for the deliberative process privilege. Regarding the attorney-client privilege, DMPED asserts that the records it withheld under the attorney-client privilege involve only emails between government employees seeking or receiving legal advice from government attorneys from the Office of the Attorney General ("OAG"). Finally, DMPED raises the issue of segregability, claiming that the documents were appropriately withheld in their entirety because the only nonexempt information would be the salutation and valediction of each email. DMPED claims that, as a result, the edited emails would provide little informational value and the process of redacting over 670 emails would involve significant cost, time, and use of resources by DMPED.

Discussion

It is the public policy of the District of Columbia that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Official Code § 2-531. In aid of that policy, DC FOIA creates the right "to inspect . . . and . . . copy any public record of a public body . . ." D.C. Official Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

[3] A copy of DMPED's response is attached for your reference.

This appeal involves DMPED's assertion of D.C. Official Code § 2-534(a)(1) ("Exemption 1")[4] as well as the deliberative process privilege and the attorney-client privilege under D.C. Official Code § 2-534(a)(4) ("Exemption 4"). Exemption 4 vests public bodies with discretion to withhold "inter-agency or intra-agency memorandums and letters which would not be available by law to a party other than an agency in litigation with the agency[.]" This exemption has been construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

Exemption 1

To withhold records under Exemption 1, the information must be: (1) a trade secret or commercial or financial information; (2) that was obtained from outside the government; and (3) would result in substantial harm to the competitive position of the person from whom the information was obtained. D.C. Official Code § 2-534(a)(1).The D.C. Circuit has defined a trade secret, for the purposes of the federal FOIA, "as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). The D.C. Circuit has also instructed that the terms "commercial" and "financial" used in the federal FOIA should be accorded their ordinary meanings. *Id* at 1290.

Exemption 1 has been "interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury." *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); s*ee also, Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989). In construing the second part of this test, "actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply." *Essex Electro Eng'rs, Inc. v. United States Secy. of the Army*, 686 F. Supp. 2d 91, 94 (D.D.C. 2010). *See also McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (The exemption "does not require the party . . . to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would "likely" do so. [citations omitted]"). The passage of time can reduce the likelihood of competitive harm. *See Teich v. FDA*, 751 F. Supp. 243, 253 (D.D.C. 1990) (rejecting competitive harm claim based partly upon fact that documents were as many as twenty years old). *But see Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 16 (D.D.C. 2000) (declaring that "[i]nformation does not become stale merely because it is old").

Of the sample we reviewed, one document was withheld based on Exemption 1, the email dated 7/1/2011 with the subject "FW: Outstanding DMA items from VMP." The email contains no text but includes 8 attachments, some of which contain commercial and financial information sufficient to meet the threshold for protection under Exemption 1. Based on DMPED's

[4] Exemption 1 exempts from disclosure "trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would results in substantial harm to the competitive position of the person from whom the information was obtained."

representation and our *in camera* review, we find that actual competition exists in the District's real estate development market and that disclosure of the commercial and financial information would allow competitors an unfair competitive advantage by copying or underbidding the consortium of developers who supplied the information and take potential clients and business. Therefore, we find that the commercial and financial information in the attachments may be withheld under Exemption 1.

Nevertheless, other attachments contain information that is neither commercial nor financial. For example, Exhibit F contains a list of "Key Personnel," and Exhibit H contains a list of "Designated Representatives" for the consortium of developers. These exhibits are not protected from disclosure under Exemption 1. Further, it is unclear whether Exhibit E - a blank form titled "Affidavit, Final Release and Waiver of Claims and Liens" – is protected from disclosure under Exemption 1. If Exhibit E is a valuable legal document created at the expense of the developers, its disclosure would be a windfall to competitors; however, if it is a basic form document of little to no value it would not be protected under Exemption 1. As a result, DMPED should reevaluate the documents withheld under Exemption 1 and disclose documents or redacted versions of the documents that are not protected under Exemption 1, subject to other exemptions under DC FOIA.

Exemption 4: Deliberative Process Privilege

Exemption 4 is commonly invoked to protect the deliberative process privilege. *See McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011). A threshold issue of the deliberative process privilege is that the information must involve an inter- or intra-agency document. Therefore, the deliberative process privilege is typically limited to documents transmitted within or among government agencies. A notable exception to the inter- or intra-agency requirement is the consultant corollary exception, which applies when a party outside the government provides advice, effectively functioning as an agency employee. *See Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 10-11 (U.S. 2001) (noting that the deliberative process privilege may apply when documents provided by outside consultants "played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done"). The consultant corollary exception is not applicable when the outside party is acting in its own interest or seeking a government benefit at the expense of other applicants. *Id* at 12. The District Court for the District of Columbia has held that "to be excluded from the exemption," the outside party "must assume a position that is 'necessarily adverse' to
the government." *Elec. Privacy Info. Ctr. v. DHS*, 892 F. Supp. 2d 28, 45-46 (D.D.C. 2012).

The deliberative process privilege protects agency documents that are both predecisional and deliberative. *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional if it was generated before the adoption of an agency policy and it is deliberative if it "reflects the give-and-take of the consultative process." *Id.*

> The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected

> by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency . . .

Id.

While the ability to pinpoint a final decision or policy may bolster the claim that an earlier document is predecisional, courts have found that an agency does not necessarily have to point specifically to an agency's final decision to demonstrate that a document is predecisional. *See e.g., Gold Anti-Trust Action Comm. Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 136 (D.D.C. 2011) (rejecting plaintiff's contention that "the Board must identify a specific decision corresponding to each [withheld] communication"); *Techserve Alliance v. Napolitano*, 803 F. Supp. 2d 16, 26-27 (D.D.C. 2011).

Here, the majority of the items listed on the *Vaughn* Index have been withheld under the deliberative process privilege. Thirty of the 33 documents we reviewed *in camera* have been withheld under the deliberative process privilege. Some of the email chains exclusively involve government personnel; however, most of the email chains involve parties outside the government. Typically, these outside parties are part of the consortium of developers involved with the development of McMillan Park.

Because outside parties are involved, the deliberative process privilege is applicable only if the outside parties fall under the consultant corollary exception. DMPED asserts that the outside parties are acting on behalf of the government pursuant to a DMA. Considering that the emails span from 2011 to 2014 and the roles of the consortium of developers changed during that time, we are unable to determine whether the consultant corollary exception applies to the outside parties here. DMPED should assess the parties during the relevant time periods to determine whether the non-governmental parties are acting on behalf of the government or in a position that is adverse to the government. *See Elec. Privacy Info. Ctr.*, 892 F. Supp. 2d at 45-46.

Even if the emails meet the extended threshold as inter- or intra-agency documents, the emails may be withheld only to the extent that they contain information that is both predecisional and deliberative. Several emails contain informational statements that do not reflect the give and take process of deliberation. Further, in some cases it is not clear that the emails are predecisional. For example, the email we reviewed dated 11/25/2013 with the subject "RE: Request for Clarification Regarding Contract…" consists almost entirely of a quote posted on the Department of Consumer and Regulatory Affairs (DCRA) website. This information is not protected by the deliberative process privilege. As a result, in addition to asserting which non-governmental parties qualify for consultant corollary exception, DMPED shall disclose documents or redacted versions of the documents that are not protected under the deliberative process privilege, subject to other exemptions under DC FOIA.

Exemption 4: Attorney-Client Privilege

The attorney-client privilege exists to protect open and frank communication between counsel and client. *See Harrison v. BOP*, 681 F. Supp. 2d 76, 82 (D.D.C. 2010). It protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Cent. Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977); *see also Rein v. U.S. Patent and Trademark Office*, 553 F. 3d 353, 377 (4th Cir. 2009). The privilege also applies to facts divulged by a client to an attorney. *Vento v. IRS*, 714 F. Supp. 2d 137, 151 (D.D.C. 2010). In addition, it "also encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts." *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005).

The attorney-client privilege was listed in the *Vaughn* Index to protect two of the email chains we reviewed *in camera*. The first, an email dated 5/10/2013 with the subject "RE: McMillan PUD Forms," involves a DMPED project manager asking a government attorney for legal advice on a procedural issue, and DMPED's director of real estate is copied on the email. In this email, an attorney client relationship exists, and everything but the salutation, introductory sentence, and valediction is protected by the attorney-client privilege. The second email dated 4/9/14 with the subject "RE: McMillan Fence" involves a response from a government attorney to a DMPED project manager, and other DMPED employees and another government attorney are copied on the email. It is not clear that this second email contains clearly protected legal advice. Based on the sample of emails we reviewed, the attorney-client clearly applies in one instance but not in another. Moreover, in the email in which the attorney-client privilege applies, there is no justification for the withholding of the entire message, as it can be reasonably segregated and redacted. Accordingly, DMPED shall review those emails it withheld on the basis of attorney-client privilege and disclose redacted versions of the documents to the extent that they are segregable, subject to other exemptions under DC FOIA.

Segregability

Under D.C. Official Code § 2-534(b), even when an agency establishes that it has properly withheld a document under an exemption, it must disclose all reasonably segregable, nonexempt portions of the document. *See, e.g., Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). "To demonstrate that it has disclosed all reasonably segregable material, 'the withholding agency must supply a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'" *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 29 (D.D.C. 2011) (quoting *Jarvik v. CIA*, 741 F .Supp. 2d 106, 120 (D.D.C. 2010)). In *Judicial Watch*, the court held that "[a]lthough purely factual information is generally not protected under the deliberative process privilege, such information can be withheld when 'the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.'" *Id*. at 28. (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)). In these instances, factual information is protected when disclosing the information would reveal an agency's decision-making process in a way that would have a chilling effect on discussion within the agency and inhibit the agency's ability to perform its functions. *Id*.

We agree with DMPED's assertion that if the only unprotected information in an email is the salutation and valediction, a redacted version of the email would produce no usable information and, as a result, the email need not be produced. During our *in camera* review, however, we found that some of the withheld emails contain sentences and phrases that can be disclosed in accordance with D.C. Official Code § 2-534(b). As for DMPED's argument that it would be unduly burdensome to review and redact over 670 emails, we note that the DC FOIA does not recognize the burden of production as a valid exemption to disclosure. The DC FOIA does allow an agency to charge fees to partially offset the costs of reviewing, processing, and producing records in accordance with D.C. Official Code § 2–532(b).

Conclusion

Based on the foregoing, we affirm in part and remand in part this matter to DMPED. DMPED shall, within 5 business days from the date of this decision, propose a fee structure for the review of the withheld emails and the production of those it determines should be released in accordance with the guidance in this decision. Once the fee structure is agreed upon, DMPED shall review and release responsive records on a rolling basis.

This constitutes the final decision of this Office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Sincerely,

/s Melissa C. Tucker

Melissa C. Tucker
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Mayor's Office of Legal Counsel

/s John A. Marsh*

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cc: Tsega Bekele, Special Assistant, DMPED (via email)

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